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Book Review. The Criminal Process in the People's Republic of China, 1949-1963 by Jerome A. Cohen

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several arbitration proceedings between states and concessionaires, this chapter is both pertinent and useful.

It should be observed that in neither of the books under review is there any reference to an earlier monograph by Simon G. Siksek which also dealt with the legal principles governing oil concessions in the Arab world,⁶ and that there is also no reference to much of the material listed in Mr. Siksek's bibliography. Treatment of the development of the Organization of Petroleum Exporting Countries (OPEC) and the Iranian oil nationalization of 1951, certainly two of the major factors in the evolution of oil concessions, is rather inadequate.

Mr. Cattán's two books will be of great interest to lawyers, government officials, business executives, and oil experts who are in any way involved in the international petroleum industry. Although some of his views are somewhat controversial and the books are marred by some faults in scholarship, Mr. Cattán has made a valuable contribution to the comprehensive treatment of a significant and complex area of law and policy. His work should also be of interest and use to all students of international law and arbitration, particularly those concerned with the legal framework of state contracts.

*Frank R. Power**

THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963: AN INTRODUCTION. By Jerome A. Cohen.† Cambridge: Harvard University Press, 1968. Pp. 706. \$15.00.

American lack of knowledge of the Chinese and their culture, a consequence of both linguistic and political barriers, has been remarkable:

"The American public," said a report issued . . . by the Council on Foreign Relations, "is not well informed about China." That is hardly the half of it — at least according to a survey of 1,501 people done for the council, a nonprofit institution (board chairman: John J. McCloy), by the University of Michigan's Survey Research Center. When asked, "What kind of government does most of China have now?" or "Do you happen to know if there is any Communist government in China now?", an incredible 28% indicated that they did not know. Moreover, 39% did not know of the existence of the Nationalist Chinese government.¹

Today through ignorance we are "caught in a role which has been partly thrust upon us and which we do not want: that of the outside oppressor,

6. S. SIKSEK, *THE LEGAL FRAMEWORK FOR OIL CONCESSIONS IN THE ARAB WORLD* (1960). Mr. Siksek deals at some length with the Hendryx-Ray controversy discussed in note 5 *supra*.

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1. *The Chinese Who?*, TIME, Dec. 25, 1964, at 15.

last target of Mao's revolution, tied in with the evils of China's past, cause of her inadequacies and obstacle to her rise."² Rational reformulation of our Asian policies requires national understanding of the attitudes and goals of the Chinese people and their leaders.

Jerome A. Cohen, Professor of Law at the Harvard Law School, has been instrumental in awakening the interest of the academic community to legal developments in Communist China. His book, designed for use in the classroom, combines Chinese documentary materials and commentary of foreign observers with evidence obtained by him in interviews with refugees in Hong Kong.³ Juxtaposition of official description and evaluations and informal statements by those who have participated in the processes discussed provides a previously unavailable view of the law in action. The scope of the study is broader than its title would suggest; it deals not only with criminal procedure but also with substantive criminal law; moreover, as in traditional China, criminal law forms the core of the legal system.

Although the materials collected by Professor Cohen offer an unparalleled introduction to legal developments on the Chinese mainland since the Communist triumph, their primary value lies in their ability to stimulate analytic inquiry. Evaluation of the role in shaping current institutions of seemingly reinforcing influences found in both Chinese history and Marxist doctrine presents frequent challenges. Since many vaguely perceived characteristics of Western legal systems appear sharply defined in contemporary Chinese practice, comparative study readily yields principles of importance in solving problems of our own society. One recent analysis of Chinese criminal law concludes:

[I]t is impossible to elucidate the basic concepts in the criminal law of Communist China in terms of a realistic penal theory based on the postulate of the "free-will" of human beings. One can hardly avoid the conclusion that the Chinese Communist legal system, under the influence of Marxist-Maoist ideology, is one in which order is superior to justice, and the law, particularly the criminal law, is largely a political weapon used by the Chinese Communist Party. . . . Professor Lon L. Fuller would conclude that, judging on the basis of the eight directions set forth by him, this legal system not only is a bad system, but can not properly be called a legal system at all.⁴

At the very least, these materials demonstrate the impropriety of such efforts to evaluate the Chinese system through simple application of Western standards without consideration of the premises and goals of an alien civilization.

2. Fairbank, Book Review, N.Y. REV. OF BOOKS, March 28, 1968, at 27, 30.

3. See Cohen, *Interviewing Chinese Refugees: Indispensable Aid to Legal Research on China*, 20 J. LEGAL ED. 33 (1967).

4. Tao, *The Criminal Law of Communist China*, 52 CORNELL L.Q. 43, 68 & n.194 (1966).

In his lengthy introduction⁵ Professor Cohen differentiates three major periods in the development of Chinese law between 1949 and 1963. In the first, which extended from the time of Communist conquest until 1953, "the criminal process served as a blunt instrument of terror, as the Chinese Communist Party proceeded relentlessly to crush all sources of political opposition and to rid society of a political but antisocial elements who plagued public order" (p. 9). From the spring of 1953 until June 1957 efforts were made, following the Soviet model, to establish "the framework of an orderly system for the administration of justice" (p. 11), which provided at least minimal protection against arbitrary oppression. Reaction to excessive criticism as a result of the "hundred flowers" movement in 1957 led to abandonment of procedural safeguards of the western type and reversion to a more rigidly totalitarian pattern differing from that of the first stage primarily in the effectiveness of centralized controls and the diminished need for harsh tactics.

Sharp disagreement concerning the sources of modern Chinese doctrine persists:

How opposed are Communist and Confucian values and institutions? How much intellectual and institutional continuity persists, overt or covert, conscious or disguised? In the West, the "sinological determinists" suggest that if you scratch a Communist, you will find a Confucian. At the other extreme, some observers, preoccupied with Communist-led social change, deny all continuity.⁶

Proof of the importance of either set of antecedents appears impossible; the system is overdetermined, so that in many instances opposing theorists can construct equally convincing models supporting their positions.

Debate over the basis of a present preference for dispute resolution through informal negotiation rather than by court action illustrates the difficulties encountered. The materials demonstrate the prevalence of "people's mediation committees," groups of low-level activists, often women, who are in practice authorized to apply informal pressure to settle or repress minor conflicts between individuals posing no political threat to the regime. Similar efforts are frequently undertaken by members of other organizations, including the police.

Professor Cohen states that in establishing mediation committees the Communists "were consciously building upon the traditional Chinese preference for coping with disputes and antisocial conduct by means of persuasion and informal pressures" (p. 123). His assertion is easily supported. In traditional China, use of the courts was discouraged: "[T]o indulge in litigation was regarded as immoral. The 'first best' and socially proper way to settle disputes, used by the 'superior man,' was by the

5. For an earlier version of this essay see Cohen, *The Criminal Process in the People's Republic of China: An Introduction*, 79 HARV. L. REV. 469 (1966).

6. Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284, 1287-88 (1967).

method of mediation, following the ethics of the 'middle way.'"⁷ The corruptness of the magistrates and their subordinates, frequent use of torture, and "insistence upon at least token punishment for anyone becoming entangled with the law, regardless of circumstances,"⁸ made resort to law almost always imprudent. Inadequacy of state-authorized solutions led to substitution of private mechanisms at the village, clan, and guild levels, providing obvious prototypes for contemporary techniques.

Professor Cohen has elsewhere added, however, that "despite the fact that the techniques of 'criticism and self-criticism' have long been employed by the Communist Party of the Soviet Union, the prominence of mediation in contemporary China does not appear to be attributable to importation of the Soviet political-legal model."⁹ Professor Lubman has recently opposed this position, pointing to Communist willingness to compel ideologically correct results even at the expense of dissatisfaction of one or more of the parties involved. He urges:

Contemporary Chinese dispute resolution seems to owe more to Communist ideology, experience, and practice than it does to Confucian tradition. . . . While it may be "tempting" to regard Communist mediators as "successors to the gentry and other prestige figures who settled most of the disputes of village, clan, and guild," it would be dangerous to yield to this temptation. Both the purposes which the Communists have assigned to mediation and the mediators and the style they are expected to use in resolving disputes contrast sharply with traditional resolution.¹⁰

Conclusive determination of priorities of influence seems unlikely.

Many sanctions usually classified as criminal in Western legal thought may in China be ordered administratively without judicial determination of culpability. The Security Administration Punishment Act of 1957 authorizes autonomous imposition by the police of penalties including incarceration for a period of up to 15 days. Close supervision of the work patterns and ideological development of the individual can likewise be directed free from court scrutiny. Rehabilitation through labor programs permit administrative confinement for periods once unlimited but since 1962 at least formally restricted to a maximum of 3 years. One person interviewed relates a 1958 assertion by an official that the only significant difference between the harshest administrative penalties and reform through labor, imprisonment decreed by a court, is that the latter is for a fixed period.

Law in traditional China was based on a criminal code setting penalties for the commission of a large number of narrowly defined offenses. Com-

7. Northrop, *The Mediation Approval Theory of Law in American Legal Realism*, 44 VA. L. REV. 347, 349 (1958).

8. D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA: EXEMPLIFIED BY 190 CH'ING DYNASTY CASES* 195 (1967).

9. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201, 1204 (1966).

10. Lubman, *supra* note 6, at 1358 (quoting Cohen, *supra* note 9, at 1226).

prehensive coverage in spite of such specificity was facilitated by a section stating: "[T]here may be cases to which no laws or statutes are precisely applicable; such cases may be determined, by an accurate comparison with others which are already provided for, and which approach most nearly to those under investigation. . . ." ¹¹ In addition, a catch-all statute provided alternative penalties of 80 blows of the heavy bamboo or 40 blows of the light bamboo for "doing what ought not to be done." ¹²

Modern Chinese law evidences a parallel approach. The Security Administration Punishment Act, for example, explicitly proscribes "struggling to be first to board a ferry, in disregard of an order to stop," "creating the possibility of an incident by selling tickets of admission to public amusement places in excess of their capacity, in disregard of dissuasion," and "damaging tree seedlings in a nursery in a way that does not create serious loss." Those who commit unenumerated acts "which violate security administration" are also to receive sanctions (Pp. 217-18, 220). The Act for Punishment of Counterrevolution of 1951 similarly provides: "Those who, with a counterrevolutionary purpose, commit crimes not covered by the provisions of this Act may be given punishments prescribed for crimes [enumerated] in this Act which are comparable to the crimes committed" (p. 302). The range of conduct thus brought within its scope may be broader than one might at first suppose: one report, for example, celebrates the capture of a fugitive who "had more than nine times engaged in sabotage activity including arson, rape, and theft" (Pp. 356-57).

On seizing power in 1949 the Communist leaders repudiated the entire Nationalist legal structure. Plans for introduction of a comprehensive criminal code were abandoned following the antirightist reaction of 1957: other legislation covers only isolated categories of criminal conduct. Communist literature classifies as criminal "all acts which endanger the people's democratic system, undermine the legal order or are socially dangerous and, according to law, should be subject to criminal punishment" (p. 318). Regulations defining common crimes and establishing maximum and minimum penalties for their commission have been circulated among officials but have not been published. It is argued that acts punished as criminal without statutory delineation, such as murder or arson, are so obviously antisocial as to render objections of lack of notice facetious. Such an approach is not wholly unfamiliar: Jerome Hall has asserted that "inasmuch as normal persons share common attitudes regarding the elementary interests protected by the criminal law, it is a fair inference that the doer of a proscribed harm knows that his conduct is immoral." ¹³

Criticism of the modern Chinese legal system has stressed its lack of procedural safeguards. Joint effort by officials guiding the criminal process

11. Quoted in D. BODDE & C. MORRIS, *supra* note 8, at 520.

12. *Id.* at 517-33.

13. Quoted in M. MAYER, *THE LAWYERS* 167 (1967). See Note, *Common Law Crimes in the United States*, 47 COLUM. L. REV. 1332 (1947).

precludes those checks to arbitrary action considered fundamental to our own law:

[B]ecause of cooperation among our three families — the procuracy, the public security organs, and the courts — we have launched a security movement, [the implementation of] which has served as a goal of the political-legal departments' joint struggle. . . . [W]e are marching in unison. . . . [W]hen the three departments, under the unified leadership of the party committee, divide their labor and cooperate, they are more united internally. As a result, the three departments become one fist and attack the enemy even more forcefully (p. 424).

As the Confucian generalist formerly counted application of the law among his duties as magistrate, the modern political leader, not the legally trained cadre, ultimately controls the punishment imposed. A 1958 attack on rightists within the procuracy alleged:

They say that "the procuratorial organs are judicial organs, are only responsible to the law, should not be responsible to the Party, and that the procuracy cannot be the yes-man of the Party committee"; their insolence is such that they want to supervise and put themselves above the Party committee (p. 383).

Today public trials in cases considered criminal by Western standards are normally morality plays staged to mobilize mass support for administration policies; adjudication in many instances has atrophied to little more than interview of the accused by a judge who already is reasonably certain of his culpability. Where more substantial intervention by the judiciary is urged protection of the defendant is not its purpose:

When a people's court adjudicates cases, it definitely cannot maintain a neutral position between the prosecutor and the defendant. A people's court is a weapon of the dictatorship of the proletariat and, although there is a division of labor and responsibility between it and the public security and procuratorial organs, the three organs perform the common task of suppressing enemies, punishing criminals, and protecting the people. A court cannot serve as a "just" arbitrator between the prosecutor and the defendant, and even less can it maintain neutrality. It should actively take the initiative in investigating criminals and in punishing them (p. 472).

The accused has only limited opportunity to rebut the charges against him: "[I]t is permissible for criminal defendants (criminals) to defend themselves, with the precondition that they not violate policies and laws and not distort the facts" (p. 473). Defense counsel, when employed, generally merely argue for mitigation of punishment. Appeal from conviction is normally allowed but seldom undertaken even by defendants aware of their opportunity, since penalties may be increased as well as reduced by a higher court or on remand and further litigation may indicate lack of repentance.

Superficial comparison of Chinese and American systems of criminal procedure may overemphasize their disparity. The drama of the jury trial can divert attention from the fact that the vast majority of our own criminal sentences are negotiated settlements made possible by admission of guilt. Procedural safeguards may be of little use to the disadvantaged individual who can nevertheless be proved guilty but needs rehabilitative assistance unobtainable either within or outside the prison. The strength of our presumption of innocence is the basis of a fictive decision, *Rex v. Haddock*, reported by A. P. Herbert.¹⁴ In this case a judgment fining a man who had jumped from Hammersmith Bridge into the Thames on a bet was affirmed on appeal. One justice stated:

It is a principle of English law that a person who appears in a police court has done something undesirable, and citizens who take it upon themselves to do unusual actions which attract the attention of the police should be careful to bring these actions into one of the recognized categories of crimes and offenses, for it is intolerable that the police should be put to the pains of inventing reasons for finding them undesirable. . . . It is not for me to say what offense the appellant has committed, but I am satisfied that he has committed *some* offense, for which he has been most properly punished.¹⁵

Another concluded that the defendant was guilty of polluting a watercourse.

Criminal procedure in any legal system embodies a balancing by the community of the disadvantages of convicting the innocent and failing to convict the guilty. Common and civil law jurisdictions have traditionally considered the consequences of the former error the more serious:

[T]he long-standing Western concern that only the guilty should suffer under the criminal law . . . prompted Hale to remark in the late 1600's that five guilty men should be acquitted before one innocent man is convicted. This kind of ratio, expressing toleration for acquitting the guilty, has become a stock figure of common law rhetoric; Blackstone raised the ratio to ten to one, and others of libertarian sentiment have favored twenty to one.¹⁶

It has been urged that Chinese disregard of procedural protections precludes efficient determination of culpability. Much criticism of Chinese criminal law, however, attacks an assumed readiness on the part of the Communist leaders to trade at a ratio below our own. Such an assumption cannot be verified simply by noting the use of non-Western techniques; indeed, presently available data appear inadequate conclusively to establish its validity. Use of a different weighting, which nevertheless may seem probable, does not ipso facto justify moral revulsion: we ourselves are willing to exchange.¹⁷

14. A.P. HERBERT, *THE UNCOMMON LAW* 24-29 (1935).

15. *Id.* at 26, 28.

16. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 *YALE L.J.* 880, 881-82 (1968).

17. Our attitude is best exemplified by a perhaps untrue story told of George Bernard Shaw. One evening he asked an attractive dinner partner if she would be

Criminal punishment in Communist China combines productive labor with an intensive program of thought reform. The importance of the prisoner as a worker reflects an approach akin to that urged during the 19th century by Jeremy Bentham in his planned Panopticon system, under which penal institutions were to be operated by private contractors for personal gain:

He himself did not see "why labour should be the less reforming for being profitable." . . . [H]e proposed that the working hours be "as many of the four and twenty as the demand for meals and sleep leave unengaged." His program for the six working days specified one-and-a-half hours for meals, seven-and-a-half for sleep, one hour for exercise, and fourteen for work. "Are fourteen hours out of twenty-four too many for even a sedentary trade? Not more than what I have seen gone through in health and cheerfulness in a workhouse by honest poor." Indeed the number could as well be fifteen, "without the smallest hardship," for "let it not be forgotten, meal times are times of rest: feeding is recreation."¹⁸

Other aspects of the scheme manifest an equally Chinese lack of solicitude toward individual liberties: "Provision was also made for the 'subsidiary establishment' to house and employ not only released prisoners but also, as one member of parliament put it, 'all those persons of blasted character who, though acquitted for want of legal proof, were thought to be guilty.'"¹⁹

Concern for rehabilitation is striking. Confession may serve "not so much to verify a prisoner's guilt as to give him a chance to make his first step toward reform" (p. 396). One 6-day local campaign to rouse offenders "consciously to give over their hearts" produced a multiplicity of admissions: "284 persons thought of insurrection, 34 thought of escape, 261 were suspicious of the government and its policies, 299 had not admitted their guilt, and 22 were dissatisfied with the government and hostile toward the cadres and the masses" (p. 602). In traditional China capital punishment was imposed only with great reluctance.²⁰ Under modern practice, execution of prisoners sentenced to death is frequently delayed pending observation of progress toward reform. As might be expected given the prospect of substitution of a lesser penalty if conduct is satisfactory, impressive ideological strides are frequently reported. Release seems often conditioned on development of approved attitudes. Willingness to continue participation in a punitive program at times appears to be considered an important indication of successful rehabilitation. A 1959 report noted:

In a little over a year some persons undergoing rehabilitation through labor have already reformed relatively well, and they have been dis-

willing to spend the night with him for \$10,000. She responded affirmatively. He then asked if she would be willing to spend the night with him for ten dollars. When she asked what kind of girl he thought she was he answered that that had already been determined and that they were now merely negotiating over price.

18. G. HIMMELFARB, *VICTORIAN MINDS* 51-52 (1968).

19. *Id.* at 67.

20. D. BODDE & C. MORRIS, *supra* note 8, at 134-43.

charged from rehabilitation through labor. Most of these persons have applied to remain in their rehabilitation through labor units and to get employment there, indicating their determination honestly to rely on their own labor for their future livelihood (p. 629).

As presented by Professor Cohen, the Chinese legal system appears to parallel the American approach to treatment of juvenile offenders prior to recent judicial interposition of procedural safeguards.²¹ Our courts have characterized controlling statutes as noncriminal, preferring to consider them "administrative police regulations of a corrective character." Rehabilitation and not punishment is their avowed goal. Behavior subjecting the individual to judicial supervision may be defined only as "growing up in idleness and crime" or "engaging in immoral conduct." Confinement for an indefinite period is common. Officials stress the value of confession; counsel for the child plays at best an attenuated role.²²

The materials collected by Professor Cohen offer remarkable teaching opportunities to the imaginative instructor. Their use can hardly be recommended too highly.

*Robert L. Birmingham**

21. See *In re Gault*, 387 U.S. 1 (1967); Comment, *In Re Gault: Understanding the Attorney's New Role*, 12 VILL. L. REV. 803 (1967).

22. See O. KETCHAM & M. PAULSEN, CASES AND MATERIALS RELATING TO JUVENILE COURTS (1967).

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